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CC: Kim Jennings/DC/USEPA/US@EPA
Subject: FYI - Despite Legal Limit, EPA Using Superfund To Address Likely Drilling Waste

From Inside EPA:

Despite Legal Limit, EPA Using Superfund To Address Likely Drilling Waste

Posted: January 20, 2012

EPA is using its Superfund law authority to investigate and address hazardous substances found in drinking water wells in Pennsylvania and Wyoming that the agency is signaling could have been caused by natural gas drilling, a rare move since the law has rarely been used to address oil and gas drilling operations.

So far, the agency has not used its authority under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for any remedial activities, and is only using the CERCLA authority for investigation and provision of alternative drinking water supplies.

But EPA's use of the CERCLA authority, which is shielded from court review, could ease EPA's ability to enforce against potentially liable parties after a federal appellate court recently indicated it will likely require a higher burden of proof to enforce a drinking water remediation order against a Texas drilling company than the agency believed.

However, the move is likely to spur controversy as industry and other critics may fear the initial action may open the door to cleanup requirements and exercise of the agency's significant powers under the law. The industry concern may be heightened because the agency has not yet definitively proven that contamination from drilling operations has caused the contamination (*see related stories*).

The agency on Jan. 19 issued an [action memorandum](#) allowing Region III to undertake additional sampling activities at approximately 61 homes in Dimock Township, PA and provide residents with alternate water supplies, citing its authority under section 104(a) of CERCLA.

But EPA in the memo is acknowledging potential legal limits because of the exemptions in the major environmental statutes, including CERCLA, the Safe Drinking Water Act, and the Resource Conservation & Recovery Act for the oil and natural gas industry.

"EPA has concluded that this action is appropriate under CERCLA at this time," Region III's hazardous site cleanup division associate director Dennis Carney says in the memo.

The memo acknowledges that EPA has rarely taken such action under CERCLA, given that petroleum and its constituents are exempt from the CERCLA definition of "hazardous substances," but says that conditions at the Pennsylvania site meet the requirements for a removal action under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) "and exemption from the statutory limits."

In a Jan. 19 concurrence memo, signed by Office of Emergency Management's Lawrence Stanton, Region III acknowledges that the move could set national precedent and that it will continue to closely coordinate its monitoring and other activities with headquarters. The concurrence allows the agency to use funds from the Superfund trust fund to conduct its investigation and provide the alternative drinking water supplies.

The agency's determination that the contamination represents an immediate public health threat reverses its earlier statements outlined in a leaked email late last year reflecting the 2010 findings of Pennsylvania Department of Environmental Protection that the pollution was due to methane migration into drinking water supplies and did not constitute a health hazard.

Water Contaminants

The agency says in the memo that arsenic, barium, glycol compounds, manganese, phenol and sodium, all of which it notes are commonly used in drilling fluids, were found in wells used by four homes as primary drinking water sources as a result of Region III's recent sampling activities, which it announced it was doing in a Dec. 29 survey to residents. "Historic drilling activities in the Dimock area may have used materials containing hazardous substances. . . The presence of hazardous substances in the four home wells constitutes a release or substantial threat of a release and the situation meets the criteria for conducting a removal action under," the NCP, EPA says in the memo.

In addition to the action under 104(a), the agency has also filed a notice under section 104 (e) of the law with Cabot Oil and Gas Corporation – the drilling company the agency has suggested may be responsible for the Dimock contamination – seeking information on the company's operations, sampling and other issues that may be relevant to determining the source of the contamination.

"EPA hereby requires that Cabot Oil & Gas Corporation . . . furnish all information and documents in your possession, custody or control that are responsive to the" information request, EPA says in the Jan. 6 order.

EPA is also using CERCLA authority to investigate contamination alleged to have come from drilling operations near Pavillion, WY. Using authority under CERCLA, EPA and the Agency for Toxic Substances & Disease Registry are studying, among other things, whether fluids from hydraulic fracturing operations contaminated drinking water wells. The agency is facing heavy criticism from industry and Republicans for suggesting the drilling operation was the likely cause of contamination.

An industry source says that the agency's authority in the Wyoming case stems from the fact that parts of the contaminated area is on public lands. – *Bridget DiCosmo*